IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10899 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HASMUKH SHAH

Versus

AMC

Appearance:

MR MC BHATT for Petitioners

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE C.K.BUCH

Date of decision: 27/12/2000

C.A.V. JUDGEMENT

(Per: B.C. Patel, J.)

1. In view of the order made on 10th October, 2000, by the Hon'ble the Chief Justice and the Hon'ble Mr. Justice A.R. Dave, the matter has been placed before this Bench.

2. The petitioners nos. 2 and 3 are the partners of petitioner no.1, a partnership firm registered under the Indian Partnership Act, 1932. They have filed this petition inter alia praying that the Town Planning Scheme Regulation (hereinafter referred to as the Regulation), Annexure-B, the provisions contained in section-18(j) of the Bombay Town Planning Act, 1955 (hereinafter to as the old Town Planning Act), the General Development Control Regulation (hereinafter referred to as the Development or Control Regulation), Annexure-D, and section-12(m) of the Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as the Development Act) be declared as ultra vires to Articles-14, 19 and 21 of the Constitution of India and therefore, void and inoperative. The petitioners have further prayed that section-18(j) of the old Town Planning Act and section-12(m) of the Development Act be declared as unconstitutional since both these provisions delegate essential legislative powers to subordinate legislative authority. The petitioners have further contended that the Ahmedabad Municipal Corporation, respondent no.1 herein, had no authority to compel the petitioners to earmark and reserve any area for common amenity as per the Development Regulation and/or Regulation and have prayed for issuance of writ of mandamus or any other appropriate writ directing respondent no.1 to decide the petitioners' application that may be made for obtaining sanction for putting up additional construction on lower level and on ground floor without taking into consideration the provisions contained in Regulation and/or Development and/or Control Regulation calling upon the person erecting a building to reserve 5% of the total F.S.I. for common amenities.

3. The petitioners have annexed with the petition the decision delivered by the Division Bench in Special Civil Application No. 8553 of 2000 dated August 24, 2000 wherein after hearing the necessary parties, the Court made an order for demolition of unauthorised construction and also issued notice to the builder, the present petitioners. The Court hearing the matter considered the submissions made by the Advocates, who were appearing for Ahmedabad Municipal Corporation and the occupiers of the shops which were constructed unauthorisedly.

4. The learned Advocate appearing for the Ahmedabad

Municipal Corporation (hereinafter referred to as the Corporation) submitted that the plans were approved for only residential purpose. He further submitted that, (i) the shops constructed in the cellar are in violation of the provisions contained in the building by-laws, regulations, etc., (ii) shops on the ground floor bearing Nos. 28, 29, 30, 31, 44, 45, 46 and 48 which were never indicated in the original plans, and are constructed not in accordance with the building by-laws, regulations and the plans submitted before the Corporation and approved by the Corporation, and, (iii) construction of 9th floor is in violation of building regulations. 9th floor was not shown in the plan and maximum permissible height having reached at 8th floor, 9th floor could never have been permitted by the Corporation. The developers/builders, the petitioners herein, erected shops contrary to the provisions of law and by concealing these facts, transferred the shops as if they were erected in accordance with the approved plan and in accordance with law.

5. It was submitted by the occupiers of unauthorised constructed shops that the builder has acted in breach of provisions contained in law and therefore, the builder should be directed to pay compensation, for which reliance was placed by the learned counsel appearing in the matter in the case of MANJU BHATIA AND ANTR. V. NEW DELHI MUNICIPAL COUNCIL AND ANTR., reported at (1997) 6 SCC 370 and particularly, paragraph-12 and 13. In response to the notice issued by the Court in Special Civil Application No. 8553 of 2000, the petitioners appeared before the Court and thereafter, they filed the present petition.

6. So far as the facts are concerned, in para-3.9 of the petition, the petitioners have come out with the case that as a builder, they have developed the property known as "Centre Point" in pursuance of development agreement made between the occupiers and the petitioners to put up the construction. The petitioners have not named the occupiers or the owner/s of the building who submitted an application along with the plans under the provisions contained in Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as the B.P.M.C. Act) and the Development Act. Chapter-15 of the B.P.M.C. Act relates to the building regulations. A person intending to erect a building or making alteration has to give a notice to the Commissioner of his intention in the form prescribed in the by-laws. The petitioners have not stated the name of the person who submitted the application for erection of the building. The

petitioners have averred that they obtained approval of the plan. In all, the scheme of the "Centre Point" consists of 4 Towers (Multi Storied Buildings). The subject matter of the petition is the Tower facing the main road, that is, Tower No.1. It is averred in the petition that the Towers were constructed on Final Plot No.673/2 of Ellisbridge Town Planning Scheme No.3. It is situated on C.G. Road. It is averred in the petition that the petitioners had entered into a contract with each occupier individually and allotted the property as stated in the contract and put them in possession. Thus, it is admitted by the petitioners that they are the persons who have handed over the possession of the constructed area (shops, flats, etc.) to the persons with whom the builder, namely, the petitioners, entered into agreements. Special Civil Application No. 8553 of 2000 was filed by one of the occupiers who was occupying the shops in the building which were constructed unauthorisedly and in utter disregard to the provisions contained in various provisions, such as the B.P.M.C. Act, Development Act, Building Regulations, By-laws, etc. It was made clear that the building was constructed for the purpose of residence. It was made further clear before the Court that Shop Nos. 1 to 27 constructed in the cellar and Shop Nos. 28, 29, 30, 31, 44, 45, 46 and 48 constructed on the Ground Floor were contrary to the provisions of law. As that was unauthorised construction, a direction was given by the Court. Not only that, but 9th floor of the building of the Tower in question was constructed unauthorisedly and the Court also issued direction in that regard. From the judgement, it is clear that there was not only unauthorised change of user of the building but also illegal and unauthorised construction, impermissible under the law. It was contended that though the property contrary to the zoning system, was put to use for purposes other than residential purposes in the immediate past, but, as all such occupiers have put back the property to the use only as permissible as per zoning system, they should not be disturbed. As they put the property to the residential use, no direction was required to be issued against such persons. The persons who were claiming to be the owners of the property in question were heard by the Court. It was alleged that the properties were constructed in accordance with law. However, it was found that there was unauthorised construction and therefore, a direction was given in para-13. The present petitioners have come out with the case that they had no opportunity to challenge the constitutional validity of the provisions contained in the Old Town Planning Act, Development Act, Regulations

and Development Regulations. Notice was issued to the petitioners in the aforesaid petition as to why they should not be directed to pay compensation, and, it appears that, therefore, they have filed this petition. The petitioners have not joined the owners of the properties who put up the plans for construction and have not placed on record agreement between the owner of the plot/building and the petitioners.

7. It was submitted before us that section-18 of the old Town Planning Act refers to making and contents of Town Planning Scheme. The said section reads as under :

"18. Subject to the provisions of this Act or any other law for the time being in force --

(1) a local authority may make one or more town planning schemes for the area within its jurisdiction or any part thereof, regard being had to the proposals in the final development plan, if any;

(2) such town planning scheme may make provisions for any of the following matters :-

(a) the laying out re-laying out of land, either vacant or already built upon;

(b) the filling up of reclamation of low-lying, swamp and unhealthy areas or levelling up of land;

(c) lay out of new streets or roads; constructions diversion, extension, alteration, improvement and stopping up of streets, roads and communications;

(d) the construction, alteration and removal of buildings, bridges and other structures;

(e) the allotment or reservation of land for roads, open spaces, gardens, recreation grounds, school, market, green belts and dairies, transport facilities and public purposes of all kinds;

(drainage inclusive of sewerage, surface or sub-soil drainage and sewage disposal;

(g) lighting;

(h) water supply;

(i) the preservation of objects of historical or national interest or natural beauty and of buildings actually used for religious purposes;

(j) the imposition of conditions and restrictions in regard to the open space to be maintained about buildings, the percentage of building area for a plot, the number, size, height and character of buildings allowed in specified areas, the purposes to which buildings or specified areas may or may not be appropriated, the sub-division of plots, the discontinuance of objectionable users of land in any area in reasonable periods, parking space and loading and unloading space for any building and the sizes of projections and advertisement signs;

(k) the suspension, so far as may be necessary for the proper carrying out of the scheme, of any rule, by-law, regulation, notification or order made or issued under any Act of the State Legislature or any of the Acts which the State Legislature is competent to amend;

(l) such other matter not inconsistent with the objects of this Act as may be prescribed. "

With effect from 1st February, 1978, the Development Act came into force and the Bombay Town Planning Act, 1955, was repealed. Section-12 of the Development Act refers to contents of draft development plan. The said section reads as under :

Sec.12. Contents of draft development plan.

(1) A draft development plan shall generally indicate the manner in which the use of land in the area covered by it shall be regulated and also indicate the manner in which the development therein shall be carried out.

(2) In particular, it shall provide, so far as may be necessary, for all or any of the following matters, namely :-

(a) proposals for designating the use of the land for residential, industrial, commercial,

agricultural and recreational purposes;

(b) proposals for the reservation of land for public purposes, such as schools, colleges and other educational institutions, medical and public health institutions, markets, social welfare and cultural institutions, theatres and places for public entertainment, public assembly, museums, art galleries, religious buildings, playgrounds, stadia, open spaces, dairies and for such other purposes as may, from time to time, be specified by the State Government;

(c) proposals for designation of areas for zoological gardens, green belts, natural reserves and sanctuaries;

(d) transport and communications, such as roads, highways, parkways, railways, waterways, canals and airport, including their extension and development;

(e) proposals for water supply, drainage, sewage disposal, other public utility amenities and services including supply of electricity and gas;

(f) reservation of land for community facilities and services;

(g) proposals for designation of sites for service industries, industrial estates and any other industrial development on an extensive scale;

(h) preservation, conservation and development of areas of natural scenery and landscape;

(i) preservation of features, structures or places of historical, natural, architectural or scientific interest and of educational value;

(j) proposals for food control and prevention of river pollution;

(k) proposals for the reservation of land for the purpose of Union, any State, local authority or any other authority or body established by or under any law for the time being in force;

(l) the filling up of reclamation of low lying, swampy or unhealthy areas or levelling up of land;

(m) provision for controlling and regulating the use and development of land within the development area, including imposition of conditions and restrictions in regard to the open space to be maintained for buildings, the percentage of building area for a plot, the location, number, size, height, number of storeys and character of buildings and density of built up area allowed in specified area, the use and purposes to which a building or specified areas of land may or may not be appropriated, the sub-divisions of plots, the discontinuance of objectionable uses of land in any area in any specified periods, parking spaces, loading and unloading space for any building and the sizes of projections and advertisement signs and hoarding and other matters as may be considered necessary for carrying out the objects of this Act;

(n) provision for preventing and removing pollution of water or air caused by the discharge of waste or other means as a result of the use of land;

(o) such other proposals for public or other purposes as may from time to time be approved by the area development authority or as may be directed by the State Government in this behalf.

If Section-18(j) and (l) of the Old Town Planning Act and section-12(m) of the Development Act are read together, it becomes clear that provisions are almost identical.

8. Section-12 of the Development Act and section-18 of the Old Town Planning Act refer to contents of draft development plan which include imposition of conditions and Regulations. After following the procedure of publication, the draft development plan, regulation, etc., in Official Gazette suggestions or objections are to be considered. In case of modification, similar procedure of publication, etc., is to be followed. The draft development plan is to be submitted for sanction of the Government. The Government may sanction the draft development plan and regulation subject to modification, if considered proper. The Government may refuse to

sanction and direct the authority to prepare a fresh plan. However, fresh development plan and regulations, if required to be drawn, after preparing the same, they are to be published in Gazette. When sanction is accorded, that will be called as final development plan. Thus, when regulations are sanctioned, it would form part of the final development plan.

9. Regulations (Conditions and Restrictions) controlling the development of the area under Town Planning Scheme, Ahmedabad, keeping in mind the provisions contained in Old Town Planning Act, were referred to us. The said Regulations are found in Manual-I, Part-II of Chapter-3 of a book published by Ahmedabad Municipal Corporation. Pertaining to the building regulations, it was submitted before us that when a development plan is in force in an area of a local authority, the regulations framed thereunder shall prevail whenever there is any conflict between the said regulation and the Development Regulations. So far as the high-rise buildings are concerned, under chapter-11 under caption superstructures, regulations are provided. It is divided into four different heads. Requirements of high-rise building under sub-clause 4 provides that certain provisions are required to be made in high rise buildings which are enumerated in clause (i) to (viii). That takes care of controlling the spacing and number of units, clear width of stairs, overhead water storage tank with necessary pumping arrangement for water supply, width of corridor, landings, lobbies and passages. It also takes care of providing a passage or a corridor to every room, tenement or office from the staircase and/or the lift well and prohibits the use of projected balcony from utilising for such a passage. With reference to provision of lift, it refers to entrance lobby to be provided on every floor at the rate to be calculated as mentioned therein. So far as clause-(vii) is concerned, that being relevant, is reproduced hereunder :

(vii) 5% of the total permissible floor-space-index means 5% of the total built-up area to be constructed on a building unit on all the floors less the exempted area as permissible under proviso to regulation no.II [22] of these regulations shall be reserved for community facilities such as library, meeting-hall, gymnasium, club-house, etc., and a watchman quarters not more than 50 sq. metres [60 sq. yds.] in

area.

Thus, reading the aforesaid provision, it is clear that 5% of the total permissible F.S.I. is to be reserved for community facilities such as library, meeting hall, gymnasium, club house, etc. and watchman quarters not more than 50 sq. mtrs. (60 sq. yards) in area.

8. Chapter-12(9) of the Development Regulations refers to superstructure :

12.9 Superstructures -

(1) Heights: The minimum height of various rooms and floors in a building measured from pavement to bottom of the lowest structural member at any point shall be as under :

(i) 2 mts. (6'-6") for dining space, verandah, bath room, garage for parking, water room, watercloset, puja room, coal room, passage stair cabin and pump room.

(ii) 2.60 mts. (8'-6") in case of ground floor and upper floor used for domestic or commercial purposes, if false ceiling is provided, its minimum clear height shall be 2 mts. (6'-6").

(iii) 3 mts. (10') in case of ground floor and upper floors in building used for factory, workshops, godowns and other industrial purposes, provided that in case of folded-roof the minimum height of 3 mts. (10') shall not be measured from the lowest point of the fold:

Provided that in case of gabled or slopping roof, the minimum height below the lowest part of roof shall not be less than 2 mts. (6'-6") and an average height of the rooms shall not be less than the minimum prescribed hereinabove.

Provided further that in case of trussed roof, the minimum height shall be measured from the pavement to bottom of the tie beam.

(2) Area of rooms and their minimum dimensions - The minimum area and dimensions of the rooms shall be as under :-

(i) 9 sq.mts.(100 sq.ft.) with no sides less than 2.40 mts. (8') for living room, a dining room, a pagi-room and a library room.

(ii) 7.20 sq. mts.(80 sq.ft.) for hostel room and hotel room with no side less than 2.40 mts. (8').

(iii) 5.4 sq. mts. (60 sq.ft.) for a store room and kitchen, study room, with no side less than 1.8 mts. (6')

(iv) 1.35 sq. mts. (15 sq.ft.) for bath room, puja room, dressing room, pump room, water room, coal room, with no side less than 90 cms. (3').

(v) 12 sq. mts. (130 sq.ft.) with width not less than 2.7 metres (9') and clear height not less than 2 mts. (6'-6") at any point in case of a garage for parking.

(vi) 0.81 sq.mts. (9 sq. ft.) for an urinal, a privey or a water-closet, washing room with side not less than 90 cms. (3').

(vii) 13.5 sq.mts. (150 sq. ft.) with width not less than 3 mts. (10') and depth not less than 4.5 metres (15') for shops and buildings used for service establishment, commercial and industrial purposes.

(viii) in case of shopping centres, the minimum dimension of shops shall be 2.4 x 1.8 mts. (8'-6")

(ix) The loft at a minimum height of 2 mts. (6'-6") not exceeding 1/3rd area of the room may be allowed in any room.

(3) Minimum requirements - The minimum requirement for various types of buildings shall be as under :-

(i) One living room, one kitchen, one bath and one latrine for one dwelling unit.

(ii) in case of cinema, theatre or a lecture hall, the aggregate area of foyer exclusive of all passages shall be provided at every sitting

level at a rate of 0.2 sq. mts. (2.5 sq. ft.) per seat.

Entry and exit passages of minimum 2 mts. (6'-6") width shall be provided.

The water-room and the snack-bar each of not less than 3 x 3 mts. (10'x10') in area shall be provided.

The booking office shall be located in the foyer in such a way that queues of persons intending to buy tickets shall not occupy the margins of the building unit.

(4) Requirements of high-rise buildings :- In case of high-rise buildings the following provisions shall be made :

(i) Subject to other building by-laws controlling the spacing and numbers, the clear width of stair shall not be less than 1.5 mts. provided that in case of exclusive residential buildings with not more than two tenements, flats or apartments on each floor the minimum width of stair shall be 1.2 mts. (4').

(ii) An overhead water storage tank with minimum capacity of 11,300 litres shall be provided on the top floor with necessary pumping arrangement for water supply.

(iii) The width of corridor, landings, lobbies and passages shall not be less than 2 mts. (6'-6").

(iv) Every room, tenement or office shall be provided with a passage or a corridor from the staircase and/or the lift-well. In no case, any part of a projected balcony shall be utilised for provision of such a passage.

(v) lift shall be provided at the rate of one lift for 20 tenements or part thereof for residential buildings and at the rate of one lift per 1000 sq. mts. or less of built up area for non residential buildings.

The tenement and built up area on ground floor and two upper floors shall be excluded in

computing the above requirement.

Lift shall be provided from ground floor and shall have a minimum capacity of six persons. On the basis of detailed calculations based on the relevant provisions of National Building code, the number of lifts can be varied.

Provided that if the number of floors does not exceed three floors, excluding the ground floor, the lift may not be provided.

(vi) Notwithstanding anything contained in the above regulation for the number of lifts, in case of high rise buildings with 25 mts. or more in height at least two shall be provided.

(vii) 5% of the total permissible floor-space-index means 5% of the total built up area to be constructed on a building unit on all the floors less the exempted are as permissible under proviso to regulation no. 2(22) of these regulations, shall be reserved for community facilities such as library, meeting-hall, gymnasium, club-house, etc. and a watchman quarters not more than 50 sq. mts (60 sq.yds.) in area.

Such space shall be provided only on the ground floor and its minimum height may be 3 mts. (10').

(viii) The entrance lobby shall be provided on every floor, at the rate of 6.75 sq. mts. (72 sq. ft.) per each flat tenement of apartment of that floor. The total area of the entrance lobby thus provided on each floor shall be continuous and integral. The entrance lobby shall be kept permanently open without any enclosure or structure and shall be accessible from all the flat, tenement, apartment stair and a lift (elevator) on that floor, no side of such lobby shall be less than 2.5 mts. (8') in width.

It was submitted before us that in the Booklet published by Ahmedabad Urban Development Authority (xerox copy), there is no reference to make a provision for community facilities similar to the provisions mentioned in the book published by the Ahmedabad Municipal Corporation. Prima facie, comparing both the clauses, it

appears that in the xerox booklet there is some error. In the xerox booklet, after the word 'under' appearing in the second line, there is omission of sentence which reads as under :

"proviso to regulation no.2(22) of these regulations, shall be reserved for community facilities."

It was submitted before us that in view of the xerox copy of the booklet, it is very clear that there is no reference for making a compulsory reservation for community facilities. It was stated that reading the provision, it cannot be said that it is mandatory to provide 5% of the total permissible F.S.I. for library, meeting hall, gymnasium, club house, etc.

We have a printed book of Rules published by the Ahmedabad Urban Development Authority which was supplied by the learned Advocate himself. We found in the book a receipt dated 25/7/1989, issued by AUDA for purchase of the book. In this printed book, Clause-(vii) of the superstructure in chapter-12.9 has been printed which we have reproduced earlier and is in the same words as printed in the book published by Corporation.

Thus, the book published by the AUDA at the earlier point of time and placed before us, makes it very clear that there is a provision calling upon the person constructing the superstructures in high-rise buildings to provide community facilities. The copy from which the learned Advocate read the provision and placed before us for perusal is a xerox copy and not the original book. Index in the printed book is not in italics while index in xerox copy is in italics. The definition clauses in the original, are printed in inverted commas in the same type of letters which appear in other part of clauses while the definition clauses appearing in the xerox copy, words are found in different mould. The definitions are given in inverted commas and the other part of clauses of definition appear in different mould. Suffice it to say that the printed copy is published by AUDA and supplied by AUDA and the book published by Ahmedabad Municipal Corporation represents same language and therefore, that is to be accepted. If the xerox copy is perused, it does not give a correct meaning and therefore also, that is not to be accepted.

11. It was contended by the learned Advocate that section-18(j) of the Old Town Planning Act touches individual property and that does not permit any

specified area to be reserved for the purpose indicated in clause-(vii) of the Regulation. The learned Advocate further submitted that when legislature had not indicated anything in section-18 (j) of the said Act to reserve any part of F.S.I. for a particular purpose, by an executive action, the area cannot be reserved. Existence of section-18(j) is a legislative action while building regulation as provided by the Ahmedabad Municipal Corporation or the Ahmedabad Urban Development Authority cannot be said to be a legislative action.

12. It is required to be noted that in pursuance of the provisions contained in sub.section-(m) of section-12 and sub.section-2(c) of section-13 of the Gujarat Town Planning and Urban Development Act, 1976, the Ahmedabad Urban Development Authority has made the regulations which are known as the General Development Control Regulation, 1981 which have come into force on and or from 23rd July, 1981. It specifically states that regulations are subject to the provisions of the Gujarat Town Planning and Urban Development Act, 1976. These regulations shall apply to all the developments in the Urban Development Area notified under sub.section-2 of section-22 of the Act vide Gujarat Government, Panchayats, Housing and Urban Development Notification No. GHB/21/UDA/1177/646(3)-Q-2, dated 31st January, 1978, as may be modified or amended from time to time.

13. The Division Bench in Special Civil Application No. 8553 of 2000 while considering the provisions of the Development Act and the B.P.M.C. Act, has observed as under :

"3. In order to promote public health, safety and the general moral and social welfare of the community, reasonable limitations were put on the use of the land and the buildings. That was only for the purpose of ensuring that in most appropriate manner, there is economical and healthy development of the City. The city has been divided into a number of "use zones" such as residential, commercial, industrial, recreational, etc. (Now, this applies to the entire area covered under the limits of the Municipal Corporations as well as AUDA). Zoning protects residential areas from the harmful invasions of commercial and industrial uses, while it also promotes business and industry by the very nature of the planned and orderly development that it ensures. By requiring the spacing of buildings, it provides adequate light,

air, protection from fire etc. It prevents overcrowding in buildings and land and thus facilitates the provisions and continued adequacy of water sewerage, transportations, schools, parks and other facilities. Ahmedabad Municipal Corporation has published the Regulations enforcing the provisions of the Development Plan and explaining the manner in which necessary permission for developing any land can be obtained from the Local Authority. The same is found in Chapter III of the Manual I Part II. Part I refers to permissions and zones. Development work must be in conformity with these rules. So far as use is concerned, it must be in conformity with the zone as provided in Clause-4 of Part I with regard to permissions and zones. The zones are provided as under :-

residential, educational institutes, City, Village, Light Industrial, General Industrial, Special Industrial, Commercial (business and offices), commercial (general), commercial (local) and garden and open space.

We are not referring in detail about the zones as there is no dispute that the building in question is situated in a residential zone and not a commercial zone. When there is a building, having 18 metres in height or above, then in that case, the builder is required to make provision as mentioned in Clause 35...."

As indicated, in high rise buildings, certain provisions are required to be made which includes common amenities in clause-(vii) of the Regulations. High rise buildings means buildings having more than 3 floors excluding the ground floor. Thus, when there is a high rise building, 5% of the total permissible F.S.I. must be reserved for community facilities, as indicated in clause-(vii). In the judgement in Special Civil Application No. 8553 of 2000 which is annexed with the petition, the Court has considered clause-35 which makes a provision for adequate fire safety measures in a building having 18 mtrs. height or above, which is meant for protection and safety of the occupiers of a building.

12. On account of urbanisation, there is heavy influx of people to the cities. On account of shortage of space, nowadays, the concept of individual building is disappearing slowly and gradually. On account of high

cost of living, price rising and the fantastic rise in the price of land and building materials, it has become almost impossible for every individual to have his own individual bungalow and therefore, people are accommodating themselves in units known as flats. In a Cooperative Housing Society having individual building, normally there is a reserved common open plot or in view of the open space available, it would provide sufficient space for the people of the society for meeting each other; the bungalows having open space would provide sufficient space for children to play games and for other activities. In a high rise building, on account of shortage of space, parking, etc., it is impossible for the members to have a common place for meeting. Generally, it would not be possible for children to find out the place for playing even indoor games. Therefore, in high rise building, it was thought fit to reserve at least 5% of the total permissible F.S.I. for common amenities so as to see that sufficient space is made available for common amenities and residential quarter for a watchman. People who are buying the properties are required to pay the cost for construction of the building and that includes this common amenity. Obviously, members would pay this cost of F.S.I. Reservation is made for the benefit of the residents of the high rise building and not for an outsider and the benefit, which is there, cannot be taken away by an outsider. For the benefits of occupiers of the building, common amenities and parking are to be provided. By showing in a plan that the common amenities and parking are to be provided and the plan, if approved on this condition, in conformity with the regulations, builder/developer cannot dispose of the area reserved for common amenities and parking to others by making unauthorised construction. In earlier days, a bungalow with open space was occupied by a family. Meaning thereby, very limited number of people were occupying a bungalow. Now, at the same place, multi storied buildings have come up having some shops and parking space and number of families are residing therein. Therefore, obviously, the question would be, where children would play and where young people would meet to discuss their common problems. In the absence of club house, where the housewives or the members will meet? It is for their enjoyment and for their better living conditions, the persons occupying the building have to contribute 5% of F.S.I. for common amenities. In fact, there is no restriction put on the rights, but, it is put to common use and that too, a limited portion is reserved for all, at the cost of all, for the purpose of all and for the use of all. It is always not possible for the local authority to provide

better living conditions for the people in a vast area. Those who are enjoying their properties for having better living conditions have to contribute and keeping these aspects in mind, the provisions have been made. By this provision, property is not taken away, but use is regulated in the interest of occupiers in all such buildings.

15. It is required to be noted that for enjoyment of property and particularly, high rise building, provisions are specifically made. The regulations made under the Scheme are only with a view to see that there is development of the plot in such a way so as to see that the persons occupying the plot or building are getting optimum advantage and not the maximum advantage. The Legislature and the rule makers were aware that the building regulations are meant for the persons living in a real society and not merely for human beings working like a machine. In a developed society, it is always essential that there is meeting of minds, people meet together, they discuss their problems and suggest their solutions. In a civilised society, it is essential that provisions are made for meeting of the minds, for playing indoor games, libraries, etc.

16. It was submitted before us by the learned Advocate for the petitioners that the delegated power to legislate by making rules are circumscribed by the statutes itself. The words "for carrying out the purpose of this Act" is a general delegation without guidelines. Such delegated power cannot be used to bring within its neck a subject excluded by the Act itself or to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act. It was stated, therefore, that in the instant case, it must be held that the rule making authority has exceeded its rule making power in so far as it pertains to 5% of F.S.I. to be reserved for common amenities, etc. It is required to be noted that in case of KUNJ BEHARI LAL BUTAIL AND OTRS. VS. STATE OF HIMACHAL PRADESH, reported in 2000 (3 SCC 40, the question of transfer of land was involved. It is required to be noted that the Court has pointed out that the delegated legislation must advance the purposes of the statute it is framed under, and unless it does so, it cannot be sustained.

As pointed out earlier, the scheme is framed, and regulations are made in view of the legislative mandate. The scheme and regulations are framed in the form of a

delegated legislation by the authority under the Act. The provisions are made to advance the purpose. The provision is made in the larger interest of public. For all high rise building the provision is made. It is in the wider social interest. Individual interest cannot come in the way.

17. In case of K.L. GUPTE VS CORPORATION OF GREATER BOMBAY, reported in AIR 1968 SC 303, dealing with the validity of the provisions contained in the Bombay Town Planning Act, 1955, the Apex Court considered a decision in case of JYOTI PERSHAD VS ADMINISTRATOR FOR THE UNION TERRITORY OF DELHI, AIR 1961 SC 1602. In that case, the owner submitted a plan to the Council of the Delhi Municipal Committee and applied for sanction for the reconstruction of the house. After the sanction of the plan, a suit was filed for eviction of 9 tenants under section-13(1)(g) of the Delhi and Ajmer Rent Control Act. In order to succeed in the suit, he had to show that he had a plan sanctioned by the Municipal authorities which made provision for the tenants then in occupation of the house to be accommodated in the house as reconstructed and that he had necessary funds to carry out reconstruction. After a decree for eviction, the tenants refused to give up the possession. Appeals were preferred by the tenants and in the meanwhile, Slum Areas (Improvement and Clearance) Act, 1956 was enacted. The petitioners' application under section-19 was turned down by the competent authority on the ground that the house was not in such a condition that it called for demolition and if sanction was given, the tenants would be thrown out and it would be impossible for them to get accommodation in reconstructed building as they were very poor and not likely to be able to pay the enhanced rent in respect of rooms in Delhi. Ultimately, the petitioners moved the Apex Court making a grievance that section-19 was invalid and unconstitutional and violate the petitioners' right guaranteed by Article-14 and 19 (1)(f) of the Constitution. It was argued that section-19(3) of the Act vested an unguided, unfettered and uncontrolled power in an executive officer to withhold permission to execute a decree which a landlord had obtained after satisfying the reasonable requirements of law as enacted in the Rent Control Act. It was further argued that the powers conferred on the authority were arbitrary and it offended Article-14 of the Constitution of India. It was further urged with regard to excessive delegation of legislative power as the executive authority could at its sweet will and pleasure disregard rights to property without any guidance from the legislature. It was also submitted that such refusal

might go on for an indefinite and indeterminate period of time affecting the petitioners' right to enjoy his property and imposing an excessive and unreasonable restraint on his right. Section-19(1) of the Slums Areas (Improvement and Clearance) Act, 1956 reads as under :

"Notwithstanding anything contained in any other law for the time being in force, no person who has obtained any decree or order for the eviction of a tenant from any building in a slum area shall be entitled to execute such decree or order except with the previous permission in writing of the competent authority"

The Court examined the provisions of the Slum Areas (Improvement and Clearance) Act and noted that the process of slum clearance and redevelopment would have to be carried out in an orderly fashion,if the purpose of the Act was to be fulfilled and the policy behind it, that is, establishment of slum dwellers in healthier and more comfortable tenements so as to improve the health and morals of the community, was to be achieved. The Apex Court observed :

"In view of foregoing, we consider that there is enough guidance to the competent authority in the use of his discretion under section-19(1) of the Act and we, therefore, reject the contention that section-19 is obnoxious to the equal protection of laws guaranteed by Article-14 of the Constitution. We need only add that it was not, and could not be, disputed that the guidance which we have held could be derived from the enactment, and that it bears reasonable and rational relationship to the object to be attained by the act and, in fact, would fulfil the purpose which the law seeks to achieve, that is, the orderly elimination of slums, with interim protection for the slum dwellers until they were moved into better dwellings".

The Court further said while considering the reasonableness of the restriction that :

"one has to take into account the fact - a fact of which judicial notice has to be taken-that there has been an unprecedented influx of population into the capital, and in such a short interval, that there has not been time for natural processes of expansion of the city to adjust itself to the increased needs. Remedies

which in normal times might be considered an unreasonable restriction on the right to hold property would not bear that aspect or be so considered when viewed in a situation of emergency brought about by exceptional and unprecedented circumstances. Just as pulling down a building to prevent the, spread of flames would be reasonable in the event of a fire, the reasonableness of the restrictions imposed by the impugned legislation has to be judged in the light of actual facts and not on a prior reasoning based on the dicta in decisions rendered in situations bearing not even the remotest resemblance to that which presented itself to Parliament when the legislation now impugned was enacted.

29. In our opinion, the observations made in the above case apply with equal force to the facts of this case. The affidavits used show what an enormous increase of population has taken place in Bombay in recent years. One cannot lose sight of the fact that the growth of the city and the industrialisation of its surroundings are going on apace and if factories are allowed to be set up just where the, owners of certain plots of land want to erect them, it would render large areas unfit for residential purposes. In the area covered by Greater Bombay, the municipal authorities have to proceed with caution when sanctioning any development work. It is well known that a master plan for Greater Bombay was prepared even before the Act came into force but by the time the Act was enacted the same was found to be out of date. The preparation of a development plan for Greater Bombay was an immense task and the authorities proceeded with it in a manner to which no exception can be taken. They formed an Advisory Committee, prepared a tentative development plan and ultimately the development plans for different wards. At all stages, suggestions and objections were received and wide publicity was given to the steps which were being taken from time to time. Although s. 12 does not in terms state the grounds on which the permission of the local authority to sanction development work may be withheld, it is clear that the authority had to proceed on the basis of the tentative plan. The legislature was aware that a good deal of time might elapse before the Development Plan was

> finally sanctioned and that is why provision was made for extension of the period of four years, if need be from time to time. After a declaration under s. 4 is made, the map is published under r. 3 and the suggestions are received, the municipal authorities must consider in the light of material before them as to whether the intended building operations ought to be sanctioned or not. Once the development plan was before it, of course, there was no difficulty. In our opinion, there was enough guidance in the Town Planning Act to enable the Municipal Commissioner to come to a conclusion as to whether a particular commencement certificate should be granted or not and the power exercisable under the sections was neither uncanalised nor arbitrary. In all these four petitions, reasons were given as to why the commencement certificate was withheld. It may be that the reason at first given was not adhered to later on, but that was because by then the plan had undergone a modification."

These observations were applied with equal force to the facts of the case viz. in case of K.L. GUPTE VS CORPORATION OF GREATER BOMBAY (supra). The Court pointed out that one cannot lose sight of the fact that the growth of the city and the industrialisation of its surroundings are going on apace and if factories are allowed to be set up just where the, owners of certain plots of land want to erect them, it could render large areas unfit for residential purposes. It is required to be noted that after immense task, a development plan is prepared. There are advisory committees for different purposes and different stages and the plans are prepared stagewise after considering the suggestions and objections. Not only that, but the suggestions from public are invited and after considering the same, the development plan including the regulations both are sanctioned by the Government and therefore, it cannot be said that the decision to reserve 5% of F.S.I. for common amenities is not guided by any provision. If provisions contained in section-18(j) and (l) of the Old Town Planning Act and section-12(m) of the Development Act are read together, it becomes clear that there are sufficient guidelines.

18. The Apex Court in the case of STATE OF GUJARAT VS SHANTILAL reported in AIR 1969 SC 634 has pointed out in para-8, 9 and 11 as under :

"8. The principal objects of the town planning legislation are to provide for planned and controlled development and use of land in urban areas. Introduction of the factory system into methods of manufacture, brought about a great exodus of population from the villages into the manufacturing centres leading to congestion and overcrowding, and cheap and insanitary dwellings were hurriedly erected often in the vicinity of the factories. Erection of these dwellings was generally subject to little supervision or control by local authorities, and the new dwellings were built in close and unregulated proximity with little or no regard to the requirements of ventilation and sanitation. Necessity to make a planned development of these new colonies for housing the influx of population in sanitary surroundings was soon felt. The Bombay Legislation enacted Act 1 of 1915 with a view to remedy the situation.

9. The Bombay Town Planning Act 27 of 1955 is modelled on the same pattern as Act 1 of 1915, but with one important variation. By Chapter II of the new Act it is obligatory upon every local authority to carry out a survey of the area within its jurisdiction and to prepare and publish in the prescribed manner a development plan and submit it to the Government for sanction. A development plan is intended to lay down in advance the manner in which the development and improvement of the entire area within the jurisdiction of the local authority are to be carried out and regulated, with particular reference to --

(a) proposals for designating the use of the land, for the purposes such as (1) residential, (2) industrial, (3) commercial, and (4) agricultural;

(b) proposals for designation of land for public purposes such as parks, playgrounds, recreation grounds, open spaces, schools, markets or medical, public health or physical culture institutions;

(c) proposals for roads and highways;

(d) proposals for the reservation of land for

the purpose of the Union, any State any local authority or any other authority established by law in India; and

(e) such other proposals for public or other purposes as may from time to time be approved by a local authority or directed by the State Government in that behalf.

By making it obligatory upon a local authority to prepare a development plan under Bombay Act 27 of 1955 it was clearly intended that the Town Planning Schemes should form part of a single cohesive pattern for development of the entire area over which the local authority had jurisdiction.

11. Under Bombay Act 27 of 1955 after a development plan is sanctioned, the local authority makes a declaration of its intention to make a scheme and then prepares a draft scheme setting out the size and shape of every reconstituted plot, so far as may be, to render it suitable for building purposes and where the plot is already built upon, to ensure that the building as far as possible complies with the provisions of the scheme as regards open space. The scheme may also make provision for lay out of lands; filing up or reclamation of lands, lay out of new streets, roads, construction diversion, extension, alteration, improvement and stopping up of streets, roads and communications; construction, alteration and removal of buildings, bridges and other structures; allotment or reservation of lands for roads, open spaces, gardens, recreation grounds, schools, markets, green belts, dairies, transport facilities, and public purposes of all kinds; drainage, lighting, water-supply; preservation of objects of historical or national interest or beauty and of buildings used for religious purposes; imposition of conditions relating to constructions and other matters not inconsistent with the object of the Act as may be prescribed. The draft scheme is published after it receives the sanction of the State Government. The State Government then appoints Town Planning Officer to perform the duties specified in Section-32 of the Act. An appeal lies to a Board of Appeal against certain decisions which the Town Planning Officer may make. After the Town Planning Officer has

dealt with the various matters relating to the draft scheme, and the appeals against his orders have been disposed of, the State Government may sanction the scheme, and on and after the date fixed in the notification sanctioning the scheme, the Town Planning Scheme has effect as if it were enacted in the Act."

In para-12, the Apex Court pointed out : "The object of the scheme being to provide amenities for the benefit of the residents generally, the area in the occupation of the individual holders of land is generally reduced, for they have to contribute out of their plots, areas which are required for maintaining the services beneficial to the community."

In para-20, the Apex Court pointed out as under :

"20. Counsel urges that the objects of the Town Planning Act in pith and substance is to facilitate planned development, to ensure healthy surroundings to the people living in congested localities and to provide them with sanitation and other urban facilities conducive to healthy living and on that account, an Act is falling within Entry-6 of list II of the 7th Schedule-"Public health and sanitation", and Entry-20 of List III-"Economic and social planning." But the competence of the legislature to enact legislation on the subject matter of the Act and for the object intended to be served thereby are irrelevant in determining whether any fundamental right of a person is infringed by the impugned Act. The doctrine of pith and substance is applicable in determining whether a statute is within the competence of legislative body, especially in a federal set up, where there is division of legislative powers: it is wholly irrelevant in determining whether the statute infringes any fundamental right."

It is required to be noted that the provisions contained in the Bombay Town Planning Act, 1954, were challenged before the highest Court and even thereafter, attempts were made to challenge the validity of the Act.

19. The Apex Court in the case of P.A. SHAH VS STATE OF GUJARAT, reported at AIR 1986 SC 468, again examined

the scheme of the Bombay Town Planning Act and in para-37, after detailed examination pointed out as under:

"We do not find any constitutional infirmity in the provisions under challenge before us. There is no ground to declare the Act which has been upheld in Shantilal Mangaldas' case, (AIR 1969 SC 634) (supra) about 17 years ago as unconstitutional now and to unsettle all settled transactions drawing inspiration from certain vague observations made in some subsequent decisions.

20. In case of MURTUJAKHAN JORAVARKHAN BABI VS MUNICIPAL CORPORATION OF AHMEDABAD reported in 1975 (16) GLR 806, the Division Bench pointed out in para-13 as under :

"The constitutional validity of the provisions of the Act has been the subject matter of at least three reported decisions of the Supreme Court."

The Court considered the decision in case of K.L.GUPTE VS CORPORATION OF GREATER BOMBAY, AIR 1968 SC 303. The Court also considered the decision of the Apex Court in the case of STATE OF GUJARAT VS SHANTILAL reported in AIR 1969 SC 634 and the decision in case of SMT. SITABATI DEBI VS STATE OF U.P., (1967) 2 SCR 949. The case of MANGALJIBHAI ROOPAJIBHAI VS STATE reported in 13 GLR 649 was also considered. The Division Bench pointed out in para-17 that the summary of the decision of the Apex Court and the decision of this Court establishes beyond doubt that the challenge to the constitutional validity of the relevant provisions of the Act is not open. The Court held : "We are, therefore, of the opinion that it is not open to the petitioner to challenge the validity of the language of the sections of the act on the ground that it infringes upon his fundamental rights".

21. The Division Bench in the case of Murtuja Khan Babi (supra) considered the decision of the Apex Court in the case of SOMAWANTI VS. STATE OF PUNJAB, reported at AIR 1963 SC 151 and pointed out that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently advanced was actually decided. Once it is found that the validity of the Act as a whole has been upheld, merely because the aspect now presented based on the guarantee contained in Article-19(1)(f) was not

expressly considered, it will not take away the binding effect of the said decision (See T.G. MUDALIAR VS STATE OF T.N., AIR 1973 SC 974).

The Division Bench in the aforesaid case further pointed out that "these observations were made with reference to a binding precedent by a Court of coordinate or concurrent jurisdiction and they will apply with greater force to the declaration of law made by the Supreme Court which binds us under Article-141".

In para-19, the Division Bench pointed out :

"We have there held (Special Civil Application No. 747 of 1971 decided on September 6, 1974) that the challenge to the provisions of the Act on the ground of violation of fundamental rights is not res integra and that merely because a new point is raised to touch the aspect of vires of the Act which is painted in a different hue or fitted with new feathers, it would not open doors for a fresh challenge."

22. It is also required to be noted that in the instant case, petitioners have not placed anything on the record indicating the nature of right they had over the plot. They have nowhere stated in the petition that they are the owners of the plot in question where the building in question has been constructed, but from reading of the petition, it appears that they were simply developers. They must come out with a specific case that they have a subsisting proprietary right in the said plot. It is required to be noted that the date on which they have filed the petition, there is no provision as it was found earlier in Article-19(1)(f) since that has been omitted with effect from 28th June, 1979. Even if Article-19(1)(f) was in force, it was absolutely essential for the petitioners to point out their right in the property. The Division Bench in case of Murtazakhan (supra) in para-21, pointed out that when action is taken under the said section, there is no subsisting title of the occupant in the land in question with a result that in the context of the said section, the provision of Article-19(1)(f) cannot possibly invoke. When plans were put up for approval, it is not the case of the petitioners, that the same were put up by them as owner of the plots. It is not their case that when building erection permission was sought, they were the owners of the land. Even today, they have no right in property. They cannot, therefore, say that their rights are

violated.

23. It is required to be noted that section-12 of the Development Act refers to contents of draft development plan and section-13 refers to publication of draft development plan. Section-12(m) refers to the use and purpose to which a building or specified areas of land may or may not be appropriated, the sub divisions of plots, discontinuance of objectionable uses of land in any area in any specified periods, parking spaces, loading and unloading space for any building and the sizes of projections and advertisements signs and hoarding and other matters as may be considered necessary for carrying out the object of the Acts. Sub.clause (c) of sub.section-2 of section-13 refers to the draft regulations for enforcing the provisions of the draft development plan. After a draft development plan is prepared and submitted to the State Government under section-9, it is to be published in the Official Gazette and in such other manner as prescribed along with a notice in the prescribed manner, inviting suggestions or objections from any person with respect to the development plan within a period of 2 months from the date of its publication. Thus, the draft development plan was published and if any person had an objection with regard to the scheme or part of the scheme, such person was entitled to raise an objection within the time specified after draft development plan was published and objections or suggestion thereof, if any received, then, in accordance with section-16, the same is to be submitted to the Government for sanction. Section-17 empowers the State Government to sanction draft development plan. Thus, we are concerned with the development scheme. It had become final. It has received the sanction or assent of the Government and it became part and parcel of the Act itself. As pointed out earlier under the Old Town Planning Act, similar scheme became part of the Act.

24. The Apex Court in the case of VASANTLAL MAGANBHAI VS. STATE OF BOMBAY, reported in AIR 1961 SC 4, has pointed out that :

> "It is now well established that the power of delegation is a constituent element of the legislative power as a whole, and in modern times when the legislatures enact laws to meet the challenge of the complex, socio economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary

powers to delegatee of their choice for carrying out the policy laid down by their Acts."

The Court further pointed out in para-4 that in dealing with the challenge to the vires of any statute on the ground of excessive delegation, it is, therefore, necessary to enquire whether the impugned delegation involves the delegation of essential legislative function or power and whether the legislature has enunciated its policy and principle and given guidance to the delegatee or not.

Section-12 of the Development Act refers to contents of draft development plan. While preparing the draft development plan, the policy indicated in section-12 is required to be kept in mind by the rule makers. It refers to regulation in the manner in which there shall be development. It further mandates that, so far as may be necessary, proposals for designating the use of the land for residential, industrial, commercial, agricultural and recreational purposes shall be demarcated. Sub.clause (m) of section-12 specifically refers to controlling and regulating use and development of land within the development area. Thus, there is power for controlling as well as regulating use and development of land. It may impose conditions and restrictions in regard to the open space to be maintained for buildings, the percentage of building area for a plot, the location, the number, size, height, number of storeys and character of buildings and density of built up area allowed in specified area, the use and purpose to which a building or specified areas of land may or may not be appropriated. It also refers to the sub-divisions of plots, discontinuance of objectionable uses of land in any area in any specified periods, parking spaces, loading and unloading space for any building and sizes of projections and advertisement signs and hoarding and it further states that and other matters as may be considered necessary for carrying out the objects of this Act.

The preamble of the Old Town Planning Act, if read, it becomes clear that it has taken a note that in most of the towns and cities, there is no room for expansion of public amenities like hospitals, schools, colleges and libraries or parks. In order that the suburbs and the surroundings of towns and cities be developed properly and not allowed to grow haphazard, the Legislature of Bombay felt that towns should be allowed to grow only on planned schemes formulated on the basis of a development plan and it is this development plan

which is required to be prepared by the rule making authority and which is to be sanctioned by the Government after inviting the objections and considering the objections, etc. Looking to the provisions contained in the Old Town Planning Act as well as the Development Act, it is very clear that the Act itself authorises drawing up of a scheme wherein all necessary provisions are required to be made and once it is sanctioned it becomes a part of the statute. Considering all these aspects, it is not possible for us to entertain the petition on any ground.

25. The three Judges Bench of this Court in the case of DUNGARLAL HARICHAND VS STATE OF GUJARAT AND OTHRS., 1976 (17) GLR 1153, held as under :

> "So far as the validity of such legislative measure is concerned, the validity can be gone into even in writ jurisdiction only to the limited extent whether there is any transgression of jurisdiction of the authorities concerned and whether the scheme as finally emerged is totally inconsistent with the Act. It is only the fundamental breaches, that is, where minimum statutory essentials are not complied with, which result in a total lack of jurisdiction and not other procedural errors or defects that would render a scheme, which had become a legislative measure and a part of the Act, liable to attack or challenge in a court on the ground that it is null and void."

The three Judges Bench of this Court in the case of Dungarlal Harichand (supra) pointed out that the Bombay Town Planning Act has been enacted to ensure that Town Planning Schemes are made in proper manner and their execution is made effective and for that a local authority is empowered to prepare a development scheme for the entire area or a part within its jurisdiction. For proper framing of schemes and implementing them, the individual rights are made subordinate to the wider social interests of the society and civic amenities. The individual interests are not allowed to outweigh and prevail over the wider social interests so as to thwart or torpedo salutary social schemes of town planning for the benefit of the public as a whole. Such schemes ought not to be allowed to suffer and individual interests have to be subordinated so as to subserve public good as they are to be expeditiously implemented in accordance with

the true legislative intention of the Act.

When guidelines could be gathered from the Preamble, Objects and Reasons and other provisions of the Acts and Rules, even if wide powers are delegated, when the validity is questioned, one will have to discover whether there is any legislative policy and what is the purpose of the statute read with provisions contained in Rules? When powers are not uncanalised, it cannot be attacked. As pointed out earlier when there is valid delegation of power, the Court has to consider whether exercise of power is arbitrary or illegal. If Regulation or Development Regulations are read with the Act, it is clear that restrictions are laid down as to what should be the minimum size of different types of rooms, type of roof, height of rooms of different type, height of hollow-plinth, cellar, etc. What part is to be used and what part is not to be used are also laid down. Purposes to which a building may be appropriated or not can be determined and can be regulated. The provisions contained in the Rules are very exhaustive and are in public interest, public health and public safety. When question of larger interest is involved, individual rights to the extent it is inconsistent with larger interest is to be curtailed.

26. It is required to be noted that learned advocate submitted that the provisions of Gujarat Town Planning and Urban Development Act, 1976 are challenged for the first time and the Court must examine independently without being influenced by the decisions of the Apex Court in connection with the Bombay Town Planning Act, 1954. We have reproduced section-18(j) and (l) of the Old Town Planning Act and section-12(m) of the Development Act. Both the sections have been compared by us. Before the Division Bench of this Court, in the case of BHUPENDRAKUMAR RAMANLAL SHAH VS STATE OF GUJARAT AND OTHERS, reported in 1995(2) GLR 1721, the Court considered this aspect. The Hon'ble the Chief Justice, B.N. Kirpal (as he then was) pointed out in para-13 as under :

"Before concluding we may take note of the judgement of the Supreme Court in the case of Maneklal Chhotalal & Ors. v. M.G. Makwana & Ors. reported in 1967 SC 1373. In that case, the challenge was to the various provisions of the Bombay Town Planning Act, 1954 which are undoubtedly in pari materia with the present act. The challenge before the Supreme Court was to the

validity of the said Act and its provisions with reference to Articles-14 and 19 of the Constitution of India. The validity of the said Act was upheld and the Supreme Court observed in paragraph 53 that , "the Act as a whole, will have to be sustained." The provisions of Sec.56 of the Bombay Town Planning Act is similar to Sec.70 and the provisions of Sec.57 of the Bombay Town Planning Act is similar to Sec.71 and Sect.51(3) is similar to Sec.65(3). It is true that there was no challenge in that case with reference to the Legislature's competence but in our opinion there is no force in that contention."

27. In view of what is observed hereinabove, we cannot accept the submissions made by the learned counsel for the petitioners. Once the Division Bench of this Court has considered the provisions of the old Town Planning Act which are undoubtedly in pari materia with the present Act, namely, the Development Act and challenge before the Apex Court was to the validity of the said Act and its provision with reference to Article-14 and 19 of the Constitution of India and the validity of the said act was upheld by the Supreme Court, we cannot take a different view than what is expressed by His Lordship, the Chief Justice, B.N. Kirpal (as he then was).

28. It is required to be noted that section-18(j) of the Old Town Planning Act, if minutely read, it becomes clear that imposition of conditions and restrictions are permissible not only with regard to open space to be maintained, the percentage of the building area for a plot, the number, size, height and character of buildings allowed in specified areas, but also with regard to the purposes to which the buildings or specified areas may or may not be appropriated. Thus, the entire building or specified area of a building, may or may not be appropriated for particular use. By making a provision of 5% of F.S.I. for common amenities with regard to all high-rise buildings, provision is made depending upon the F.S.I. used in each plot. More the F.S.I., more the provision for common amenities and lesser the use of F.S.I., lesser the provision for common amenities. Sub-clause-(l) specifically refers to such other matter which is not inconsistent with the objects of the Act as may be prescribed. This is a residuary clause. Reading clause (j) and (l) together, it becomes clear that 5% of F.S.I. may not be appropriated for residential use and

may be appropriated for common amenities and would fall in both the clauses viz. (j) and (l) of section-18 of the Old Town Planning Act. Making of a provision for common amenities is certainly not inconsistent with the objects of the Act.

29. This provision cannot be said to be arbitrary or unconstitutional. Loss of F.S.I. is to the owner of the building or user of the building. It is for the owner/user of the property to make a grievance. When a cooperative society or a non trading association is constructing a building, the loss will be either to the cooperative society or to the nontrading association and not to the developer. Section-12(m) of Development Act specifically refers to the use and purposes to which a building or specified area of land may or may not appropriated and other matter as may be considered necessary for carrying out the objects of this Act. Thus, the language is conveying the same meaning. In the Development Act, in continuance, it is stated, "and other matters as may be considered necessary for carrying out objects of this Act". Wide meaning must be given. Under section-12, the word "development" must be given, therefore, wide meaning. It is also required to be noted that the guidelines are provided in section-12 itself by words "for carrying out the objects of the Act" which is found in the end of sub-clause (m). It is for the development of the land and it is for the purpose to which a building or specified areas of the building may or may not be appropriated. The use and purpose to which a building may or may not be appropriated is to be read along with other matters as may be considered necessary for carrying out the objects of this Act. Reading entire sub-clause (m) of section-12 of the Development Act, and Development Regulation or section-18(j) and (l) of the Old Town Planning Act and regulation, it becomes clear that 5% of the F.S.I. in a high-rise building is to be used for the purpose of common amenities and therefore, it cannot be said that there is absolute restriction on the use of the property by the members of a cooperative society or a non trading corporation, where the building is owned by a cooperative society or a non trading corporation. Right is given to all to use in a particular manner, that is, for the benefit of the occupiers of the building.

30. It is required to be noted that the validity of section-3 of Essential Supplies (Temporary Powers) Act, 1946 was challenged on the ground that the legislature cannot delegate its function of laying down legislative

policy in respect of a measure and its formulation as a rule of conduct. The Court considered section-3 of the Act in the case of HARISHANKAR BEGIA V. M.P. STATE, AIR 1954 SC 465, as under :

"(6) Under powers conferred by Section 3 the Central Government promulgated on 10th September, 1948 Cotton Textiles (Control of Movement) Order, 1943. Section 2 of this Order defines the expressions "apparel", "carrier", "hosiery", "cloth" and "textile commissioner". Section 3 of the Order runs as follows :

"3. No person shall transport or cause to be transported by rail, road, air, sea or inland navigation any cloth, yarn or apparel except under and in accordance with -

(i) a general permit notified in the Gazette of India by the Textile Commissioner, or

(ii) a special transport permit issued by the Textile Commissioner."

Section 8 provides that the Textile Commissioner may, by notification in the Gazette of India, prescribe the manner in which any application for a special transport permit under this Order shall be made. The Central Government has prescribed forms for application for obtaining permits and the conditions under which permits can be obtained."

With reference to excessive delegation, the Court in case of Harishanker Begia (supra) held in para-9 as under :

"As already pointed out the preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy."

31. The Apex Court, in the case of RAMESH BIRCH VS UNION OF INDIA reported in AIR 1990 SC 560, in para-19, pointed out:

"A perusal of the above judgements shows that the validity of the provisions in question were upheld on different lines of reasoning. Nevertheless all the learned Judges seem to have agreed - and, indeed, as pointed out in later decisions, it is inevitable in modern conditions - that, while Parliament should have ample and extensive powers of legislation, these should include a power to entrust some of those functions and powers to another body or authority....."

The Court further pointed out:

"A different way in which the second of the above views has been enunciated -- and it is this view which has dominated since -- is by saying that the legislators cannot wash their hands off their essential legislative functions. Essential legislative function consists in laying down the legislative policy with sufficient clearness and in enunciating the standards which are to be enacted into a rule of law. This cannot be delegated. What can be delegated is only the task of subordinate legislation which is by its very nature ancillary to the statute which delegates the power to make it and which must be within the policy and framework of the guidance provided by the legislature."

In para-26, the Court pointed out that :

"We may, in this context, repeat again that courts, in the decided cases, do not envisage a meticulous enunciation of a policy in all its details. They are satisfied even if they can discern even faint glimmering of one from the object and scheme of the legislation. "

In the instant case, the very nature of the Act makes it clear that after inviting and considering objections from the public at large, regulations have been sanctioned by the State Government. Rules have been framed for better living. Looking to the Rules, it is clear that the task of framing the rules for development of land was left to the authority under the Act.

32. It is required to be noted that the learned Advocate for the petitioners has taken us through the repealed Act and the provisions of the Constitution which are not in force and which were not in force even at the

relevant time. No document showing any rights from owner of the property is produced. No documents are placed on record to show that what was passed on was the property erected in accordance with law. Society being the owner of the land could have permitted to erect a building in accordance with law. It is for the Society to raise a grievance. The petitioners, as a matter of fact, never raised grievance about the plans which were approved by the respondent Corporation. When the Corporation approved the plan, it was for the owner to raise a dispute. Even assuming for the sake of argument that the petitioners could have constructed the building because of the authority given by the Society, the petitioners have not raised grievance before the Corporation. The petitioners could not have exercised their own discretion in construction of building. The owner of the building namely, the society put up the plans before the corporation for approval and as a builder or even as a developer, the petitioners could have erected the building as per the approved plan. The plans were put up by the society and the society was permitted to erect the building as per plans. May be, the petitioners might have acted as a builder, but certainly, what society could not do, the builder also could not.

Article-300(A) has been inserted in the Constitution of India with effect from 20th June, 1979 which reads as under :

"No person shall be deprived of his property saved by authority of law. Right to property under Article-300(A) is not a basic feature or structure of the Constitution."

At the cost of repetition, it is to be stated that in the petition, the petitioners have nowhere averred that they have right in the property and therefore, there is no substance in the contention raised by the petitioners.

33. The learned Advocate for the petitioners submitted that the Town Planning Scheme No.3 was framed under the provisions contained in the Old Town Planning Act. When the Gujarat Town Planning and Urban Development Act was enacted and when it came in force from 1st February, 1978, Article-19(1)(f) was in operation and the amendment is not retrospective, but it is prospective and therefore, the learned Advocate for the petitioners contended that the petitioners are entitled to challenge the constitutional validity of section-18(j) of the Bombay Town Planning Act and the

Town Planning Scheme Regulation framed thereunder and also section-12(m) of the Gujarat Town Planning and Urban Development Act and Regulation No. 12(ii)(vii) of the Control Regulation framed by AUDA, being ultra vires to the Article-19(1)(f) of the Constitution of India. When the petitioners became owners of the property in question is not stated anywhere. As a matter of fact, from the contents of the petition, it transpires that they were merely builders and not the owners of the property. From the judgement annexed to the petition, it also appears that the petition was preferred by the owners of the shops and occupiers and they were claiming the rights in the shops. The shop owners, as a matter of fact, stated that they were prepared to see that the shops are not used, as such, and the place earmarked in the plan as common amenities is used for the said purpose. It was also pointed out in the judgement that the building was not constructed as per the plan and therefore, it must be put as per the plan. From the judgement, it also transpires that the plan is sanctioned which was put up by one Mr. Upendra Shah who was at relevant time having a control over the Amichand Cooperative Housing Society Limited as a Secretary. Thus, from the text of the judgement, it appears that the Cooperative society was the owner of the Tower in question and not the petitioners. The petitioners have not specifically stated on oath that they were the owners of the building and/or they are the owners of the building. They have no proprietary rights over the plot in question. Keeping this aspect in mind, the provisions are required to be taken into consideration. The petitioners have nowhere stated in their petition as to the date on which the plans were submitted before the Ahmedabad Municipal Corporation. In Civil Application No. 8317 of 2000 in Special Civil Application No. 8553 of 2000 after hearing the submissions, the Court disposed of the application. It is clear from the order that the application was submitted to the Town Development Officer for revised plan which was received on 5/9/1983. The said application was signed by Chairman/Secretary of Amichand Cooperative Housing Society Ltd. The plan was also signed by C.K. Daftari, an Engineer licenced by the Corporation. Along with that application, necessary documents were also tendered which were signed by the Chairman/Secretary of the Society and the licenced Engineer. It was the duty of the petitioners to place on record the date on which the plans were submitted to the Ahmedabad Municipal Corporation. Merely by stating that when the Development Act was enacted and when it came in force from 1/2/1978, Article-19(1)(f) was very much in operation, is not leading the petitioners anywhere. As a

matter of fact, with effect from 20th June, 1979, Article-19(1)(f) has been omitted and on and after that date, there is no question of claiming any right under the shelter of Article-19(1)(f). The constitutionality of the act cannot be challenged on or after 20th June, 1979 taking shelter of Article-19(1)(f).

34. In case of BHIKHAJI NARAIN VS STATE OF MADHYA PRADESH, reported at AIR 1955 SC 781, the Court considered the effect of amendment. In that case, very far reaching amendments were introduced by the C.P. & Berar Motor Vehicles (Amendment) Act, 1947 in the Motor Vehicles Act, 1939, in its application to the Central Provinces and Berar by section-3 of the amending Act.

The Court held as under :

"The result of these amendments was that power was given to the Government (i) to fix fares or freights throughout the Province or for any area or for any route, (ii) to cancel any permit after the expiry of three months from the date of notification declaring its intention to do so and on payment of such compensation as might be provided by the Rules, (iii) to declare its intention to engage in the business of road transport generally or in any area specified in the notification, (iv) to limit the period of the license to a period less than the minimum specified in the Act and (v) to direct the specified Transport Authority to grant a permit, inter alia, to the Government or any undertaking in which Government was financially interested."

"A cursory perusal of the new provisions introduced by the amending Act will show that very extensive powers were conferred on the Provincial Government and the latter were authorised, in exercise of these powers, not only to regulate or control the fares or freights but also to take up the entire motor transport business in the province and run it in competition with and even to the exclusion of all motor transport operators. It was in exercise of the powers under the newly added sub-section (3) of section 58 that the period of the permit was limited to four months at a time. It was in exercise of powers conferred on it by the new section 43 (1) (iv) that the Notification hereinafter mentioned declaring the intention of the Government to take up certain routes was issued."

"Then came our Constitution on the 26th January 1950. Part III of the Constitution is headed "Fundamental Rights" and consists of articles 12 to 35. By article 19(1) the Constitution guarantees to all citizens the right to freedom under seven heads. Although in article 19(1) all these rights are expressed in unqualified language, none of them, however, is absolute, for each of them is cut down or limited by whichever of the several clauses (2) to (6) of that article is applicable to the particular right. Thus the right to practise any profession or to carry on any occupation, trade or business conferred by article 19(1)(g) was controlled by clause (6)".

So far as Article-19(1)(f) is concerned, sub-clause (5) at relevant time, as it stood was as under:

"Nothing in sub.clause-(d), (e) and (f) of the same shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for protection of interests of any Scheduled Tribe."

In para-7 of the aforesaid judgement, the Court pointed out that :

"The new provisions introduced by the Act authorised the Provincial Government to exclude all private motor transport operators from the field of transport business. 'Prima facie', therefore, the Court expressed an opinion that it was an infraction of the provisions of Article-19(1)(g) of the Constitution and would be void under Article-13(1) unless the invasion by the Provincial Legislature of the fundamental right could be justified under the provisions of clause-6 of Article-19 on the ground that it imposed reasonable restrictions on the exercise of right under Article-19(1)(g) in the interests of the general public."

The Court pointed out in para-8 that on 18/6/1951, there was Constitution (1st Amendment) Act, 1951. By section-3(1) of the Act for clause-2 of Article-19 a new sub clause was substituted which was

expressly made retrospective. Clause-6 of the Article-19 was also amended. The Court pointed out that after 18/6/1951 when clause-6 was amended by the Constitution (1st Amendment) Act, 1951, the amending Act ceased to be inconsistent with the fundamental right guaranteed by Article-19(1)(g) read with amended clause-6 of that Article, because that article, as it now stands, permits the creation by law of State monopoly in respect, 'inter alia', of motor transport business and it became operative again even as against citizens.

The Court pointed out that the effect of Constitution (1st Amendment) Act, was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then, it is not intelligible what "existing law" could have been sought to be saved from the operation of Article-19(1)(g) by the amended clause-6 in so far as it sanctioned the creation of State monopoly, for, 'ex hypothesi', all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of clause-6 as it then stood. The Court pointed out that after the amendment of clause-6, the impugned Act immediately became fully operative even as against the citizens. The notification declaring the intention of the State to take over the bus routes to the exclusion of all other motor transport operators was published on 4/2/1955 when it was perfectly constitutional for the State to do so. Thus, the Court pointed out that the true position is that the impugned law became, as it was, eclipsed, for the time being, by the fundamental right.

35. In the instant case, there is nothing to show that the petitioners are the owners of the property in question and therefore, they had no right whatsoever, in the property. The petitioners have not produced even agreement on record under which they are claiming right to develop the property and to pass on the constructed property. If there is breach of the agreement, it is for them to consider whether to take appropriate action as permissible under law or not. But, certainly without any right and title over the property, they have no right to claim relief in the way in which it is claimed.

36. The petitioners have further come out with the case that under section-18(j) of the Old Town Planning Act and section-12(m) of the Development Act, there is excessive delegation of essential legislative powers, which is violative of Article-14 of the Constitution of India, and therefore, the said provisions are void. The petitioners have contended that there is no power

conferred on the local authority to frame any regulation compelling the occupiers of the property to reserve any area for any luxurious amenity like club house, gymnasium, library, etc. It is contended by the petitioners that the local authority was empowered to frame regulation in respect of construction of building only and it does not confer any power to compel the occupier to put the property or part of the property to particular use. According to the petitioners, authority has travelled beyond the scope of delegated legislative power. According to the petitioners, the common amenities are totally foreign to the entire Town Planning Act. It is contended by the petitioners that an individual cannot be compelled to provide public amenities. It is for the individual whether to read or not or whether to do physical exercise or not. These aspects are totally foreign to the Town Planning Scheme. Considering all these aspects, the petitioners have averred that the provision can be made by legislature only. The Regulations prepared are, therefore, ultra vires or at any rate, the Act cannot confer on local authority to make arbitrary and discriminatory provisions.

37. It is absolutely necessary to make it clear that this is not a case where the scheme has been framed by the State Legislature and which is sought to be amended by an executive Act or by the authority constituted under the Act. What is the scheme? Whether it is framed by the Legislature or whether the Scheme is framed and approved by the State Government, are the important aspects to be taken into consideration. In para-12, the Hon'ble the Chief Justice, B.N. Kirpal (as he then was) in the case of BHUPENDRAKUMAR RAMANLAL SHAH VS STATE, reported in 1995 (2) GLR 1721, pointed out as under :

> "12. It was also submitted by Shri Patel that an essential legislative function cannot be delegated. There can be no doubt with this proposition, but we find ourselves unable to hold that framing a scheme of Town Planning is an essential legislative function. The Act lays down the guidelines and the manner in which a Town Planning Scheme is to be framed. The schemes are to be framed by the local authorities which are constituted under the Act. The scheme cannot be regarded as an essential legislative function which can only be exercised by the State Legislature."

The Court further pointed out that :

"Here the Town Planning Schemes are framed by that very authority which has been given, by virtue of section-71, the power to amend the scheme".

In para-11, it has been further pointed out that :

"In our opinion the provision of Articles-245 and 246 does not come into play here. This is not a case where the scheme has been framed by the State Legislature and which is sought to be amended by an executive act or by the authority granted under section-71 of the Act. The scheme itself is a form of delegated legislation having been framed not by the Act, but by the authority constituted under the Act. It is that very authority to whom power has been given to amend the scheme".

Thus, it is very clear that the scheme is framed and is sanctioned by the State Government. The main text covers "subject to the provision of this Act or any other law for the time being in force" and words used are wide enough to include the provision and therefore, it cannot be said that it is beyond the scope and that there is an excessive legislation.

38. Wade, in his Administrative Law, (in 7th Edition), has pointed out :

"If a local authority grants planning permission improperly, or licenses indecent films for exhibition, it does a wrong to the public interest, but no wrong to anyone in particular. If no one has standing to call it to account, it can disregard the law with impunity - a result which would 'make an ass of the law'."

It was submitted that as Governmental powers and duties have increased, and as public interests has gained prominence at the expense of private right, more liberal principles have emerged. The prerogative remedies, in particular, have shown their worth, since they exist for public as well as private purposes and provide the nucleus for a system of public law. The Attorney General can act in the public interest and will sometimes, though not always, do so. The resources of the legal system are

adequate to solve the problems which are basically problems of judicial policy. The learned Advocate cited this from the Administrative Law of Wade with a view to point out that there is a problem which must be solved and no technical plea should be raised of having any locus to file the petition. It was submitted that every citizen has standing to invite the Court to prevent some abuse of power and in doing so he may claim to be regarded not as a meddlesome busybody but as a public benefactor. In the case before us, there is no question of abuse of power or exercise of excessive delegation or excessive delegated legislation. Since number of years the policy is accepted for public good and the provisions are made for public good, as provided in the Regulations. Merely because one person claims the interests without any rights, the larger sections, cannot be asked to suffer.

We are in complete agreement with the aforesaid views in the aforesaid text. It has been rightly said that if a local authority grants planning permission improperly, it does wrong to the public interest and if no one is challenging inaction on the part of the local authority, the result would be as stated by the learned author. The officers of the local authority in several cases have kept mum and have not initiated any action.

The larger Bench of this Court in the case of DUNGARLAL HARICHAND VS STATE reported in 1976 (17) GLR 1152 has pointed out that individual interests should not be allowed to outweigh and prevail over the wider social interests so as to thwart or torpedo salutary social schemes of Town Planning for the benefit of the public as a whole. The Court pointed out that individual interests have to be subordinated so as to subserve public good. It is also required to be noted that the provision of 5% of F.S.I. to be reserved for common amenities and for watchman's quarter to look after the building and the occupiers cannot be said to be inconsistent with the provisions made under the Old Town Planning Act and the Development Act. More particularly, when the provision made in the scheme which had become final after it received the sanction of the Government and became part and parcel of the Act itself, one cannot make a grievance about the same.

39. In the result, this petition stands dismissed.

[B.C. Patel, J.]

[C. K. Buch, J.]

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